SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 736

LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, both Deceased, and LUCY POCATELLO JOHNSON, MAUDE POCATELLO RACEHORSE, JOSEPHINE POCATELLO and RAY POCATELLO, Heirs of Washington Pocatello and Minnie Pocatello, Deceased,

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY, UTAH,

Defendants and Respondents.

MOTION TO DISMISS APPEAL.

To the Honorable Supreme Court of the United States:

Come now the appellees, Amasa L. Clark and Joseph E. Robinson, and each of them, and move this Honorable Court to dismiss the appeal herein for the reasons and upon the grounds following:

1. That the record affirmatively shows that no Federal question is involved in this action.

2. That no Federal statute or treaty is involved and the State court has made no judgment nor has there been any holding as to a Federal statute or treaty.

3. That no State statute has been construed nor has judgment been rendered holding a State statute valid as against an attack on Federal grounds and that the validity of a State statute is not drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States.

4. That the decision of the State trial court and the affirmance of said judgment by the Supreme Court of the State of Utah are not based upon the determination of any Federal questions.

5. That the questions now raised were not raised and relied on in the State courts.

6. That no substantial question is raised for even if there were error and even if this error involved a Federal question, such error would not be substantial or prejudicial because the trial court in its Findings of Fact #27 and #28 based its decision upon ratification, estoppel, *laches* and the running of the statute of limitations as well as upon the grounds argued on appeal, which said former grounds alone would be enough to support the decision of the lower court.

7. The Bill of Exceptions on appeal to the Supreme Court of the State of Utah were stricken and no evidence can be reviewed by this Honorable Court as there is no evidence in the record.

This motion is supported by the records and files in said cause and by the objections of appellees to the jurisdiction of this Honorable Court heretofore served upon appellants and their attorneys and filed herein.

Dated this 24th day of September, 1941.

AMASA L. CLARK AND
JOSEPH E. ROBINSON,
By their attorneys,
WILLIAM J. LOWE,
DEAN F. BRAYTON.
1001-5 Walker Bank Building,
Salt Lake City, Utah.

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LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, Both Deceased, and LUCY POCATELLO JOHNSON, MAUDE POCATELLO RACEHORSE, JOSEPHINE POCATELLO and RAY POCATELLO, Heirs of Washington Pocatello and Minnie Pocatello, Deceased.

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY, UTAH,

Defendants and Respondents.

RESPONDENTS' STATEMENT DISCLOSING GROUNDS AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Supreme Court of the United States:

Come now the respondents, Amasa L. Clark and Joseph E. Robinson, and respectfully submit that this Honorable Court has no jurisdiction on appeal in this matter for the reasons following:

1. That the record affirmatively shows that no Federal question is involved. That the District Court of the First

Judicial District of the State of Utah entered its Findings and Decree in this action, that after an appeal to the Supreme Court of the State of Utah, by a unanimous decision, the judgment of the trial court was affirmed and that said judgment is final and not subject to review by this Honorable Court.

2. That no Federal statute or treaty is involved and the State court has made no judgment nor has there been any holding as to a Federal statute or treaty.

3. That no State statute has been construed nor has a judgment been rendered holding a State statute to be valid as against an attack on Federal grounds and that the validity of a State statute is not drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States.

4. That the decision of the State court is not based upon the determination of any Federal question.

5. That the questions now raised were not raised and relied on in the State courts.

6. That no substantial question is raised; even if there were error and even if this error involved a Federal question, such error would not be substantial or prejudicial because the trial court in its Findings of Fact #27 and #28 based its decision upon ratification, estoppel, *laches* and the running of the statute of limitations, as well as upon the grounds argued on appeal. These grounds alone would be enough to support the decision of the lower court.

7. The Bill of Exceptions on appeal to the Supreme Court of the State of Utah were stricken and nothing can be reviewed by this Honorable Court as there is no evidence in the record.

A review of appellants' petition, assignments and statements clearly discloses no Federal question. In reviewing the matters set forth by appellants, we will consider them

in the order in which appellants set them forth disregarding repetition.

I. Appellants' first contention is that the State District Court wrongfully placed upon the appellants the burden of proving compliance with the terms of the escrow agreement. They base this contention upon 25 U.S.C.A. Sec. 194, which provides:

> "In all trials about the right of property in which an Indian may be a party on one side and a White person on the other, the burden of proof shall rest upon the White person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

This statute has two possible interpretations, one is that it places the burden of going forward with the evidence upon the White person, the other is that it places the burden of persuasion upon the White person.

If it is construed as dealing with the burden of going forward with the evidence, respondents affirmatively satisfied this burden. Respondents showed, as the lower court expressly found, that they claimed under a deed which had been properly recorded. By this showing the presumption arose that the conditions of the Escrow were fully complied with.

> *Merchants & Farmers State Bank by Peyton* v. *Olson*, 189 Minn. 528, 215 N. W. 366, 89 A. L. R. 1289.

In *Swain* v. *McMillan*, 31 Mont. 433, 76 Pac. 943, 946, the Court, in an identical situation where the grantor was claiming that the deed was delivered by the depository without compliance with the terms of the escrow, said:

> "When one appears of record to be the owner in fee of real estate, another alleging the contrary must show the fact by clear and convincing proof".

Thus, even though the ultimate burden of going forward with the evidence was placed upon the appellants, such a placing of the burden would be correct in spite of the statute providing the burden should be on the White person for, although the burden was originally upon the respondents, this burden shifted to the appellants when the respondents entered evidence from which the presumption arose that the conditions were complied with. The lower court found that the appellants offered no evidence to rebut this presumption so a Finding against the appellants was justified.

If, on the other hand, the statute be construed to deal with burden of persuasion rather than with the burden of going forward with the evidence, error cannot be shown because that would involve a weighing of the evidence and there is no evidence to be reviewed by this Honorable Court since the appellants' Bill of Exceptions has been stricken.

The above discussion assumes the burden was placed upon appellants. However, nowhere in the record did the District Court mention burden of proof. In the absence of a showing that the District Court was in error, it must be assumed on appeal that the correct law was applied by the lower court. Thus, if the burden should have been on respondents, it must be assumed that it was actually so placed by the lower court. Appellants attempt to rebut this presumption by setting forth the Ninth Finding of Fact. This Finding states, among other things, that

> "From the evidence in the case, the Court finds that said $3200.00 recited in the deed was paid to said Escrow Holder."

This indicates that respondents offered affirmative evidence as to the payment of the $3200.00. Appellants' contention that this Finding indicates that appellants failed to offer any evidence and that therefore the court found against them is unsound for the court would have said:

> "and from the *lack* of evidence in the case"

if the court had meant what the appellants contend.

Appellants made no Assignment of Error as to the burden of proof so the entire question argued above is not even before the appellate court.

II. Appellants' second contention is that there was no allegation that the conditions of the Escrow Agreement were complied with and that there was no allegation of rightful delivery.

This involves no Federal question. 25 U. S. C. A. Sec. 194, quoted above, deals only with burden of proof and has nothing to do with pleading. The Fourteenth Amendment would not be violated even if there were no such allegations as referred to by appellants for the question of compliance with the terms of the Escrow Agreement was fully litigated in the District Court and a fair trial was had. So, even if an error of law was made, it would not be a violation of due process.

Furthermore, in paragraph 9 of respondents' answer, there in fact is an allegation "that the First National Bank of Pocatello, Idaho, delivered said deed". A reasonable interpretation of such allegation would be that a proper, rather than an improper, delivery is referred to. Also, respondents alleged "which on its face recited a consideration of $3200.00, was regularly filed for record". As shown by the above cited cases of *Swain* v. *McMillan*, 31 Mont. 433, 76 Pac. 943, 946, and *Merchants & Farmers State Bank by Peyton* v. *Olson*, 189 Minn. 528, 215 N. W. 366, 89 A. L. R. 1289, this is an allegation of facts sufficient to create a presumption of proper delivery. Therefore, appellants' contention that respondents made no such allegation is erroneous.

Appellants made no Assignment of Error concerning respondents' pleadings. Also this question is not argued in either the District Court or Supreme Court so it is not now reviewable by the Honorable Supreme Court of the United States.

III. Appellants' third contention is that the respondents' predecessor in interest had notice by reason of the Recording Act of a non-compliance with the terms of the Escrow Agreement. Such notice of a non-compliance would be impossible since the trial court found that the conditions were in fact complied with. Also as the trial court pointed out in Findings of Fact #13 and in its Memorandum of Decision, there was nothing recorded to put the respondents or respondents' predecessor in interest on notice of the alleged defect.

Even if there were error in this regard there is no Federal question involved. Appellants indiscriminately say throughout their Petition for Appeal that any and all alleged errors at law that they have attempted to show deprive them of equal protection and of due process of law. If their contention is correct, all decisions of a State Supreme Court could be reviewed by the United States Supreme Court. Appellants had a fair trial in the lower court and have not been deprived of their constitutional rights.

There is no Assignment of Error covering this point, nor was it argued in the State Supreme Court of Utah, so this question cannot now be raised.

IV. Appellants' next contention is that the depository of the deed in escrow could not deliver the deed after the conditions were complied with because the Grantor had since died and 102-11-26 Revised Statutes of Utah, 1933, entitled "Specific Performance of Decedents' Contracts", provides, "when a person who is bound by a contract in writing to convey real estate * * * dies * * * the Court may make a decree authorizing and directing his Executor or administrator to convey."

No Federal question is involved. At most, it is an error of State law, and the State Supreme Court of Utah, not

the United States Supreme Court, is the final arbiter in such matters. Appellants again claim a violation of the Fourteenth Amendment but even if there were an error of law, no constitutional rights are affected.

Furthermore, there is no error. The Utah statute refers to *contracts* to convey. A deed placed in escrow is a conveyance rather than a contract and there thus is no question of specific performance involved.

V. Appellants' next contention is that the deed in escrow was invalid because the approval of the Secretary of the Interior was not obtained.

Contrary to appellants' statement in their Petition for Appeal, it was neither admitted by respondents nor found to be a fact by the court, that Washington and Minnie Pocatello were wards of the Government. The admission covers only the appellants and not appellants' ancestors.

As the State Supreme Court stated in its opinion "as far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been, * * * if at all applicable * * * complied with".

There has been no showing that the statute applies to the factual situation presented in this case. Although the appellants alleged in their complaint that the statute applied, there was not a finding to the effect that Washington and Minnie Pocatello were Tribal Indians, and since it is presumed on appeal that the lower court committed no error, it must now be assumed that Pocatello and his wife, like Pocatello's parents Pooe and Yaotes Owa, were citizens of the United States as shown by Finding of Fact #25, and that thus 25 U. S. C. A. 81 would not apply because of the express exception of citizens of the United States.

Following a similar line of reasoning, now that the Bill of Exceptions has been stricken and there is no evidence

before the Court, it is impossible to determine whether or not approval of the Secretary of Interior was in fact given. And since error is not presumed on appeal, it must be assumed that such approval was given.

The other two statutes cited by appellants concerning approval by the Secretary of Interior, if applicable, must also be assumed to have been complied with. They likewise are inapplicable, however, for 25 U. S. C. A. 379, May 27, 1902, c. 888, Sec. 7, 32 Stat. 275, refers to a deed with restrictions, and the restrictions in the deed in this case had expired. The wording of the statute indicates that the approval of the Secretary refers only to a conveyance in violation of the restrictions contained in the deed since the statute provides that a deed "when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued by allottee".

Furthermore, the statute deals only with allotted lands and the land involved in this case was homestead land acquired by a citizen as shown by Finding of Fact #25.

The other statute, 25 U. S. C. A. 405 (Mar. 1, 1907, c. 2285, 34 Stat. 1018) refers to non-competent Indians. There has been no Finding that Pocatello was insane nor has there been a Finding that he was not a citizen of the United States. Furthermore, the statute refers to allotted land and this was homestead land. It deals with restrictions imposed by the patent as shown by the wording of the statute that a conveyance approved by the Secretary "shall convey full title to the land or interests so sold, the same as if fee simple patent had been issued to the allottee". Therefore, the statute is inapplicable to the case at bar.

Also the latter statute is now introduced for the first time by appellants. They should not be precluded from raising such an objection.

VI. Appellants' next contention is that respondent had the burden of proof on appeal to the State Supreme Court of Utah and that therefore the State Supreme Court could not strike their Bill of Exceptions. This involves no Federal question.

Furthermore, this objection was raised for the first time in the appellants' Petition for Rehearing before the State Supreme Court, which is too late a date to raise such an objection.

Appellants state two reasons why the burden should have been on the respondent on the appeal to the State Supreme Court. One is that 25 U. S. C. A. Sec. 194 places the burden of proof in the litigation with Indians upon the White person and that that burden of proof is not only in the lower court but also continues on appeal. This contention is unsound. The intention of the Legislature would not be to upset the general rule on appeal that it is the appellants duty to show error. A reasonable construction of the statute would be that it deals only with burden of proof in the lower court where the evidence was presented. If this were not the correct construction of the statute, in a law action where the questions of fact are not reviewable, the statute would always be violated.

Appellants' second reason why the burden should have been placed on respondent on appeal is that this is an equity action in which questions of both law and fact are reviewed. This involves no Federal question. Furthermore, it is an unsound contention for even in an equity action the burden is always upon the appellant.

Tatsuno v. *Kasai*, 70 Utah 203, 259 Pac. 318.

The court in *Escamilla* v. *Pingree*, 44 Ut. 421, 427; 141 Pac. 103, the Utah court said:

> "This is * * * an equity case, and, therefore, unless the presumption of correctness of the proceeding

and judgment is clearly overcome, the judgment must prevail".

In the case of *Hargraves* v. *Burton*, 59 Ut. 575, 585; 206 Pac. 262, cited by appellants to sustain their contention, the Utah court said:

> "But, as stated in the beginning, this is a case in equity in which we are required to determine the facts as well as the law, and in which we are not bound by the Finding of the trial court, if, in our opinion, they are clearly against the weight of the evidence".

VII. Appellants' next contention is that the administrator's Report, stating that part of the purchase price was received, was entitled to judicial notice in the State Supreme Court, and so the Supreme Court erred in affirming the trial court findings that the full purchase price was paid.

This involves no Federal question.

The probate proceeding which appellants claim is entitled to judicial notice is no more a judicial proceeding than is the present case. It is not contended by appellants that the evidence in the present case is entitled to judicial notice, and the evidence in the present case is not before the court because the Bill of Exceptions was stricken. It would seem even clearer that evidence in another proceeding is not entitled to judicial notice when evidence in a case at bar is not so entitled.

In Re Evans, 42 Utah 282, 130 Pac. 217.

23 C. J., Sec. 1920, page 113, Footnote (a) provides:

> "As a rule the judgment and proceeding in another case than that on trial, even between the same parties, will not be taken notice of by the court of its own motion. Otherwise the matters might be considered that a party has no opportunity to meet and explain".

If appellants' contention were correct the State Supreme Court would be bound to disregard the Findings of Fact of

the lower court because of the mere filing of an account by an administrator in another proceeding setting forth certain facts contrary to those facts found by the trial court, when such account had not even been approved by the probate court. We submit this would be incorrect.

As the State Supreme Court points out this is a question concerning weight of the evidence which question cannot now be reviewed because the Bill of Exceptions has been stricken.

VIII. Appellants' next contention deals with the delivery of the deed out of escrow by the depository. Appellants state that delivery can be made, and the doctrine of relation back to the time of delivery in escrow can be applied, only after a compliance with the conditions of the escrow agreement. With this we agree, but the lower court expressly found that the conditions were complied with. Appellants also state that the doctrine of relation back was wrongly applied because such doctrine should be applied only in the "furtherance of justice".

We submit that these contentions involve no Federal question.

Furthermore, the application of the doctrine of relation back does result in a "furtherance of justice".

Foxley v. *Rich*, et al., 35 Utah 162; 99 Pac. 666, cited by appellants, is a case in which rights of third parties have intervened. Here the heirs gave no value for the land and so are not intervening third parties. Indeed, they would be unjustly enriched if they were allowed to retain land which had been sold by their ancestor. For they would then inherit both the land and the purchase price (which the court found was paid).

IX. Appellants' Assignment of Error #10 is far from clear. They state that the Supreme Court of Utah erred in saying "Should Washington Pocatello have lived until

the date of the decree of distribution of the Estate of Yaotes Owa, and the court have then decreed to him the undivided one-third interest, the conditions of the escrow agreement having in the meantime been fully complied with by the grantee in the escrow deed and the deed delivered, the decree of the court would merely confirm the title warranted by the deed. The same result is effected by delivery upon performance of the conditions after the grantors death."

In the first place, this is merely a hypothetical situation and even if the court were wrong there would be no grounds for reversal.

In the second place, there is no Federal question.

In the third place, there was was no error. Appellants state that the court presumed a compliance with the terms of the conditions of the escrow agreement contrary to the record in the case. The evidence is not before the appellate court since the Bill of Exceptions has been stricken and the only thing the record discloses as to a compliance with the conditions is the statement previously quoted in Findings of Fact #9 that "From the evidence in the case the court finds that said $3200.00 recited in the deed was paid to said escrow holder".

Respondents fail to see how 101-4-2 Revised Statutes of Utah 1933, dealing with administration of estates, is at all relevant.

X. In the latter part of their statements of jurisdiction, appellants say that they, appellants, were incompetent, quoting 102-13-20 Revised Statutes of Utah 1933. The statute by its terms applies to those actually incapable of caring for property. Such a determination of incompetency would not be controlled by Federal statute making all Indians wards of the Government.

But, appellants fail to show that this statute dealing with incompetency is relevant to this case. They state

broadly that the appellants because incompetent were entitled to "special protection of the courts of Utah". We cannot see how a probate statute has any connection with the case at bar which concerns a delivery *inter vivos*. If the statute is applicable, we cannot see that it provides for "special protection". If it provides for special protection, we cannot see how appellants were denied such protection. And, finally, if denied such protection, we cannot see how the United States Supreme Court can review the question inasmuch as no Assignment of Error covers the point and there is no Federal question involved.

XI. There are several allusions by appellants throughout their petition for appeal to the fact that appellants are nonresidents of Utah and respondents are residents, implying that the Utah courts have discriminated in favor of their own residents. Appellants do not go beyond this mere generality, however, and in the absence of specific instances of discrimination such allusion should be disregarded. The record discloses that the plaintiffs voluntarily came into the State courts and petitioned for the appointment of an administratrix over the estates of Washington Pocatello and Minnie Pocatello, his wife, both deceased. Such administratrix was appointed in the probate court of Box Elder County. The action was prosecuted voluntarily by the plaintiffs in the State court by themselves and through the special administratrix. Findings of Fact and Conclusions of Law were fully made by the trial court and judgment was entered thereon. Appeal was taken from this judgment to the Supreme Court of the State of Utah and the judgment of the trial court was unanimously affirmed by the Supreme Court.

XII. Even if there were error and even if this error involved a Federal question, the error would not be prejudicial because the trial court, in Findings of Fact #27 and

#28, based its decision upon ratification, estoppel, *laches* and the running of the statute of limitations, as well as upon the grounds argued on appeal. These grounds alone would be enough to support the decision of the lower court.

Therefore, it is respectfully submitted that appellants have no grounds for appeal; that no Federal question is involved; that the appeal does not come within the statutory provisions for an appeal from the State courts to the Supreme Court of the United States and that this appeal should be dismissed.

Respectfully submitted,

WILLIAM J. LOWE,
DEAN F. BRAYTON,
Attorneys for Respondents,
Amasa L. Clark and Joseph E. Robinson.